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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 44

LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL.,

Petitioners,

vs.

HAYES FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF STATE OF INDIANA AS AMICUS CURIAE

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INTEREST OF AMI

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FOREWORD

Illinois and Indiana share the common problem of the second most congested traffic area in the United States: the Chicago commercial zone and the Calumet-Lake County District. Every week day in the Calumet district alone motor vehicles make an average of 355,335 trips each 24 hours, for an aggregate total of 2.6 million miles per day. This survey was based on 1949 figures, published in 1953,

with the estimate that this traffic will increase by 114 per cent by the year 1970.*

The experience of this state with the imposition of fines as a penalty for violations of the Indiana gross weight limitations forcefully bears out the statement of the Illinois Supreme Court:

> "* * * that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. * * *." *Hayes Freight Lines, Inc., vs. Latham Castle, Atty. Gen., et al.*, 2 Ill. 2d 58, 117 N. E. 2d 106, 112.

Thus, in May, 1953, the Indiana Legislature established a special detail of 12 state policemen to concentrate exclusively on violations of the Public Service Commission laws. These 12 men, during the years 1953 and 1954, made 75 per cent of the staggering number of arrests for overweight violations, shown below:

1953		*1954*	
May	399	January	611
June	312	February	595
July	139	March	675
August	406	April	595
September	847	May	502
October	894	June	617
November	668	July	465
December	641	August	695
Total	4306	Total	4655

* 1953, Calumet District Traffic Survey Report of the State Highway Dept. of Indiana (Federal Aid Project SWHP-1 14), prepared by the Metropolitan Area Traffic Survey Unit of the State Highway Dept. of Indiana with the cooperation of the Bureau of Public Roads, and the cities of Gary, Hammond, East Chicago, Whiting and Hobart, Indiana.

The State of Indiana has therefore been compelled to resort to more stringent measures for the enforcement of its gross weight limitations. The remedy has been found in two Indiana statutes. The first, Burns' Indiana Statutes, 1952 Replacement, Section 47-536b, enacted in 1951, affords sanctions for repeated weight violations, much like those of the Illinois statute at issue in the case at bar, though less severe than the sanctions imposed by the Illinois statute. (See Resp. Br., Appendix C, for comparison of Indiana and Illinois statutes.)

A second Indiana statute vests in the Public Service Commission of Indiana a general authorization to suspend the state certificates or permits of operating authority of motor carriers, including inter-state carriers "for • • • *willful* failure to comply with any provisions of this act (the Public Service Commission Act) • • • with any term, condition or limitation of such certificate or permit." Burns' Indiana Statutes, 1952 Replacement, Section 47-1233. (Emphasis supplied.)

The validity of the last mentioned statute has twice been in litigation during the year, 1953. In that year the Indiana Public Service Commission gave notice to two inter-state motor carriers, operating through the Calumet district, to show cause why they should not have their state operating certificates suspended by reason of repeated violations of Indiana gross weight limitations. After due hearing, the Commission suspended the certificate of each carrier to use the highways of Indiana for one week. Each carrier appealed to the courts and one case is still pending. The other case was eventually dismissed by the carrier itself.

It is pertinent to note that although the violations of both carriers prior to the time of the court proceedings had

been numerous, in the case of the carrier which dismissed its law suit and instigated a new management policy, no further violations have occurred during the several months since the time of such dismissal.

Indiana, therefore, like Illinois, has a vital interest in the upholding of its statutory right to impose reasonable sanctions for the enforcement of its valid weight regulations. The urgency of this need is highlighted by the aforementioned prospect of a 114 per cent increase in the traffic volume between the years 1949 and 1970.

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ARGUMENT

I.

The Sole Issue In The Case At Bar Is Whether A State Statute, Authorizing Suspension Of The Permit Of An Inter-State Motor Carrier To Use The Highways Of The State, As A Penalty For And A Deterrent To Repeated Violations Of State-Imposed Maximum Weight Limitations, Is Repugnant To Part II Of The Interstate Commerce Act.

Before proceeding with argument it seems advisable to re-state the issue in this case. The sole issue here is whether Congress, in enacting the Federal Motor Carrier Act (now Part II of the Interstate Commerce Act; 49 U. S. C. Sec. 301 et seq.) so completely occupied the field of inter-state motor carrier regulation as to preclude a state from enforcing its weight limitations by suspending the privilege of an offending inter-state trucker to operate over the highways of that state.

Both parties to the case at bar concede that Congressional occupation of the inter-state motor carrier field under Part II of the Interstate Commerce Act is the single question here at issue (Pet. Br. p. 2, Resp. Br. p. 2). Yet repeatedly throughout its brief, Respondent advances arguments which would only have relevance if this appeal were founded upon constitutional questions of "due process", or of state power under the Commerce Clause. Thus Respondent argues that the penalty imposed upon it was unduly severe[1] (Resp. Br. pp. 13, 15), that to interrupt the inter-

[1] Note also Respondent's comparison of the sanctions imposed by the Illinois Statute with those of the similar Indiana Statute (Appendix "C", Resp. Br. pp. 50-51). Respondent seems to suggest that the

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state journey of an offending truck would be a valid means of enforcement, but to interrupt the interstate business of the corporate entity, operating such truck, would not (Resp. Br. p. 23) and that the imposition of heavy fines and prison sentences would be sufficiently effective deterrents to weight violations without resorting to the sanctions here complained of (Resp. Br. 29-30). Granted that the constitutionality of a state statute under the "Due Process" and Commerce Clauses depends upon the reasonableness of the penalty exacted, the suitability of the means of enforcement to the end in view, and the extent of the burden upon interstate commerce. Nevertheless, those questions were determined adversely to Respondent by the court below,[2] Respondent's cross-appeal from the decision of the Illinois court was dismissed by the United States Supreme Court (*Hayes Freight Lines, Inc. v. Castle*, 74 S. Ct. 866) and certiorari was granted on the narrow issue, whether the Illinois Court erred in holding that regulatory powers, admittedly vested in the states prior to enactment of the

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Illinois Statute is unreasonably severe because Illinois has seen fit to exact a 90 day suspension for 10 overload convictions within a year, whereas Indiana exacts only a 5 day suspension for 10 convictions and because Illinois includes axle overload, as well as gross overload, convictions while Indiana counts only the latter.

[2] Finding no violation of due process in the Illinois Statute, the Illinois Supreme Court said:

> "The State's continuing search for effective enforcement techniques to secure compliance with valid weight limits is apparent in the legislation dealing with the subject. (Citations). The General Assembly might infer that the truckers find the payment of statutory penalties when violation is established to be economically preferable to compliance. But the State is entitled to insist upon compliance with its valid regulations, and to shape its penalty to that end." (*Hayes Freight Lines v. Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 112.)

Federal Motor Carrier Act,[a] were divested and superseded by that enactment in 1935.

If it be true, as the Illinois court held, that the Federal Act precludes a state from suspending the privilege of an interstate motor carrier to use state highways, then a state would be powerless to suspend such privilege, even though the offending carrier flouted state weight limitations daily and deliberately and even though the period of suspension was only for a single day. In order fairly to test the issue presented by this appeal, such an extreme case should be assumed.

II.

A Federally Granted Certificate Of Convenience And Necessity Under Part II Of The Interstate Commerce Act Vests In The Holder No Proprietary Right In The Use Of State Highways, Whether In Interstate Commerce Or Otherwise; Nor Does It Deprive The States Of Their Traditional Police Power To Enforce Valid Size And Weight Regulations, Even By Denying To Offending Motor Carriers The Privilege Of Using State Highways In Interstate Commerce.

It is too well settled to permit of dispute that prior to the Federal Motor Carrier Act, 1935, the states, under their reserved police powers and with a view to the safety and preservation of the public highways, could establish maxi-

[a] The Illinois Supreme Court conceded in the decision below that: "Before the Federal regulation of interstate motor carriers became effective, the power of the States to suspend or revoke authority to engage in interstate commerce, as a sanction of the enforcement of State statutes regulating the use of the highways, was sustained." (*See Hayes Freight Lines v Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 113).

mum weight limitations for motor vehicles, applicable to intrastate and interstate carriers alike, and could enforce such limitations, even by closing the highways to carriers operating, or threatening to operate, in violation of same, *Morris v. Duby* (1927), 274 U. S. 135; *Sproles v. Binford* (1932), 286 U. S. 374; *Bradley v. Public Utility Commission of Ohio* (1933), 289 U. S. 92; *Wald Storage and Transfer Co. v. Smith*, (D. C. Texas, 1933) 4 F. Supp. 61, affirmed (1933) 290 U. S. 596. This pre-existing power was conceded below by the Illinois Supreme Court, (see footnote 3, this brief), which based its holding on a finding that the state power was superseded by the federal Act, *Hayes Freight Lines v. Castle* (1954), 2 Ill. 2d 58, p. ——, 117 N. E. 2d 106, p. 114.

It is respectfully submitted that the Illinois court erred in so holding. Neither the court below nor Respondent[4] contest the obvious fact that the federal statute leaves open to state regulation the sizes and weights of motor carriers, operating over public highways. To be sure, the Interstate Commerce Commission is "• • • authorized to *investigate* and *report* on the need for Federal regulation of the sizes and weight of motor vehicles • • •" (Pt. II, Interstate Commerce Act, Sec. 226; 49 U. S. C. Sec. 325). (Emphasis supplied.) But this narrow authorization, as pointed out in *Maurer v. Hamilton* (1940), 309 U. S. 598, p. 607,

> "• • • imposes no duty and confers no authority on the Commission to regulate the sizes and weights

[4] Thus Respondent conceded that "Since Congress has not specified, nor authorized the Interstate Commerce Commission to specify, regulations with respect to sizes or weights of motor carriers, this Court has concluded that the state is free, within the bounds of reason, to impose such limitations as it considers proper." (Resp. Br. p. 23).

> of motor vehicles. Its authority is limited to investigation and report of the need of such regulation."

Moreover, when the report was forthcoming, no federal action was recommended to Congress in the weight-size areas, the Coordinator expressing doubts not only "• • • as to what the regulation should be, but also as to how far the federal government has power to interfere with the exercise of the police power of the states with respect to the use of their highways." (See Hearings before Senate Committee on Interstate Commerce on S. 1629, 74th Cong., 1st Sess. (1935) p. 92). Nor did Congress at any time take action in this area.

The Illinois court and Respondent take the position, however, that, while the states may impose weight and size limitations upon interstate, as well as intrastate, traffic, their powers of enforcement, as to interstate traffic, are restricted to measures short of closing the highways to violators of the state regulations. This position is founded on what we submit to be an erroneous assumption that a grant by the Interstate Commerce Commission of a Certificate of Convenience and Necessity confers upon the holder an affirmative right in the use of the public highways in inter-state commerce, which the states are powerless to impair.

The clearest refutation of this affirmative right theory is provided by the federal Act itself, which states, with respect to an Interstate Commerce Commission Certificate:

> "No certificate issued under this part (chapter) shall confer any proprietary or property rights in the use of the Public highways." (See Interstate Commerce Act, Part II, Sec. 207 (b); 49 U. S. C. Sec. 307 (b)).

The manifest import of this language is that the grant of an I.C.C. Certificate does not *create* an affirmative right to use the highways in interstate commerce, but merely *removes* the pre-existing disqualification, which obtained prior to the issuance of such Certificate. Before the enactment of the Motor Carrier Act, 1935, any motor carrier who so desired could operate in inter-state commerce, subject to the right of the states to close their roads to him if he exceeded their weight or size limitations. After the Motor Carrier Act, 1935, only federally certified carriers could operate in interstate commerce, but the Act makes it clear that the federal certificate does not purport to confer upon the privileged few any rights in the use of the highways superior to those enjoyed by all, prior to the passage of the Act.

The United States Court of Appeals for the Fifth Circuit stated the above proposition as follows:

> "Moreover, said act (Motor Carrier Act) does not provide that every person who shall receive a certificate of public convenience and necessity shall be entitled to the use of the various highways of the state, but the said act prohibits any one engaging in interstate commerce until he receives such certificate from the Interstate Commerce Commission." See *Thompson v. McDonald* (CCA 5th, 1938) 95 F2d 937, p. 943.[5]

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[5] *Thompson v. McDonald*, 95 F. 2d 937 specifically held that the federal Motor Carrier Act did not operate to oust the state of Texas of its right to close its highways to an inter-state trucker on the ground that "the highways over which complainant sought to operate are not in such condition as to justify the issuance of a permit to him, and that said highways are now so congested that his operation would unreasonably interfere with the uses thereof by the traveling public" (95 F. 2d p. 941). Nor was the Fifth Circuit Court impressed with complainant's argument that because complainant had an application

In short, the I.C.C. Certificate merely removes a barrier; it creates no proprietary right.

The courts have uniformly upheld the power of the states to deny the use of their highways to motor carriers, violating, or threatening to violate, state weight and size limitations, whether or not operating in inter state commerce—and this *after* the Motor Carrier Act, 1935, as well as theretofore.

In *South Carolina State Highway Department v. Barnwell Bros.* (1938) it was squarely held that the federal Motor Carrier Act, 1935, had not superseded the constitutional right of the state of South Carolina to close its roads to inter-state trucks, weighing, with load, in excess of 20,000 pounds, even though it was shown that 85 to 90 per cent of all inter-state motor trucks weighed in excess of that amount, when loaded, and that only four other states had prescribed such a stringent weight limitation. In *Maurer v. Hamilton* (1940), 309 U. S. 598, the Supreme Court reached the same result with respect to a Pennsylvania statute prohibiting motor trucks which carried vehicles above the cab or over the head of the operators, interstate or otherwise, from operating over highways of that commonwealth. See also *Darnell Trucking Co. v. Simpson* (1940), 122 W. Va. 656, 12 S. E. 2d 516, appeal dismissed (1941), 313 U. S. 549,

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for an interstate certificate pending before the I. C. C., that tribunal had assumed exclusive jurisdiction of the question of complainant's entitlement to use the Texas highways in its interstate business. Although this decision was affirmed by the U. S. Supreme Court, that court was not called upon to decide whether the state power had been superseded by the federal Act, since it found that the trucker had not been operating in compliance with state law in the first place and was not, therefore, entitled to an inter-state certificate. See *McDonald v. Thompson* (1938), 305 U. S. 263.

upholding a West Virginia statute, prohibiting the use of double-decked trucks on highways of that state.

Respondent seeks to distinguish the *Barnwell*, 303 U. S. 177 and the *Maurer*, 309 U. S. 598, cases, supra, on the ground that these decisions merely uphold the right of the states to *impose* these prohibitions and not the right to *enforce* them by suspension of a state permit to operate. (Resp. Br. p. 22-23). It is submitted that there is no substance to this distinction. Implicit in any judicial finding that a statutory prohibition is valid, are two basic assumptions: (1) That the statutory mandate will be obeyed voluntarily by the law-abiding majority; (2) That the uncooperative minority may be compelled to conform by whatever reasonable[6] enforcement measures are deemed necessary.

In any event, this court has specifically decided that a state may suspend the privilege of a motor carrier to operate over the highways within such state in inter-state commerce, as a penalty for violations of valid state regulations, covering matters in which Congress has not occupied the field. In *Welch Co. v. State of New Hampshire* (1939), 306

[6] As pointed out above, the reasonableness of the sanction employed in the case at bar is not here at issue. But even if it were, the complete answer to Respondent's arguments that less stringent measures would have sufficed may be found in the following excerpts from the opinion in the *Barnwell* case, 303 U. S. 177, pp. 190-191: "Where Congress has not acted, a court is not called upon, as are the state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. (Citation) When the action of a Legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety, are not for the determination of the courts, but for the legislative body."

U. S. 79, as a penalty for violations of a New Hampshire statute, limiting the number of hours of continuous driving, permissible for a driver of a motor carrier using the highways of that state, the state suspended for five days the state certificate of the H. P. Welch Co. and this was held to be a valid exercise of the state police power, not in conflict with the federal Motor Carrier Act, 1935.

The Illinois Supreme Court, in its opinion below in the case at bar, mistakenly assumed that the *Welch* case predated the Motor Carrier Act and sought to distinguish it on that ground. Thus the Illinois court stated that the court in the *Welch* case

> "strongly suggested that the power of the state would be superseded when the Federal Motor Vehicle Act * * * became effective", *Hayes Freight Lines v. Castle*, 2 Ill. 2d 58, 117 N. E. 2d 106, p. 113.

This was an entirely erroneous assumption. Not only was *Welch Co. v. State of New Hampshire* (1939), 306 U. S. 79 decided *after* the Motor Carrier Act, 1935, but the court expressly decided that the federal Act did *not* supersede the state power to impose the sanction in question.

To be sure, at the time of the *Welch* decision, the Interstate Commerce Commission, in pursuance of an explicit authorization under the Motor Carrier Act so to do, had promulgated certain federal maximum hours of continuous-driving regulations. But these I.C.C. regulations were not yet effective on the date of the *Welch* decision and the court therefore held that the state power to enforce its own regulations had not yet been superseded. If the sanction imposed by the state of New Hampshire in *Welch Co. v. New Hampshire* (1939), 306 U. S. 79 was upheld, in the face of existing, though not yet effective, conflicting federal

regulations, *a fortiori* the sanction imposed by the state of Illinois in the case at bar should be upheld, for in the case at bar the I.C.C. has not only failed to exercise the power, but does not even possess the power, to regulate weights and sizes of trucks using state highways.

Respondent seeks to discredit *Welch Co. v. New Hampshire*, (1939), 306 U. S. 79, as authority for the right of a state to suspend the operations of an inter-state motor carrier, on the ground that "it involved no attempt by the state to suspend the right to operate solely in inter-state commerce." (Resp. Br. p. 18). Let Respondent's point be conceded. The Welch Co. was not engaged *solely* in inter-state commerce. But the facts show that 99 per cent of its business was inter-state, so that for all intents and purposes it may as well have been engaged *exclusively* in inter-state commerce. Moreover, the Supreme Court disregarded the 1 per cent of Welch's business which was not inter-state commerce, stating the issue thus (306 U. S. p. 84):

> "The sole question is whether Congress intended that from the time of the federal enactment until effective action by the Commission, there should be no regulation of periods of continuous operation by drivers of motor vehicles hauling in *interstate* commerce." (Emphasis supplied)

Not only with respect to weights and sizes and maximum hours of driving, but also in other fields, the courts have had no difficulty in upholding state sanctions, even where the operative effect is a prohibition of the privilege of using state highways in inter-state commerce. Thus in *Ziffrin Inc. v. Reeves* (1939), 308 U. S. 132, despite the fact that the trucker in question had obtained an I.C.C. Certificate under the federal Motor Carrier Act, the Supreme Court

upheld the right of the state of Kentucky to refuse Ziffrin a state permit to haul liquor from Kentucky to Illinois. Again, in *Buck v. California* (1952), 343 U. S. 99, the Motor Carrier Act of 1935, was held to be no obstacle to denial by the County of San Diego, California, of a permit to use the county highways for the carrying on of a taxi-cab business in foreign commerce between California and Mexico. Although the *Buck* case was a five to four decision, even the dissenters conceded that they would have agreed with the majority view, had the enforcement of weight limitations been in issue. Said Justice Reed, who wrote the dissenting opinion (343 U. S. p. 108):

> "We assume that San Diego County might require that loads should not exceed a reasonable minimum weight and that, *if appellants violated such regulation, the county could properly prohibit them from driving their taxicabs across the County.*" (Emphasis supplied.)

In each of these decisions, the Courts had only to find that the subject matter of the state regulation had not been dealt with by Congress or by the Interstate Commerce Commission, under the federal Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act). Having so found, the courts uniformly upheld the right of the state in question to enforce its regulations, whether by denying in the first instance, or by subsequently suspending, the privilege of the carrier to use the highways of the state, in inter-state commerce or otherwise.

The significant fact is that, in face of this uniform line of decisions, Respondent offers not a single authority to the contrary, except for the decision of the Illinois court below.

It is submitted, therefore, that the decision of the Illinois court must be reversed and the validity of the Illinois statute, here in issue, upheld in all respects.

Respectfully Submitted,

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